

# THE "RIGHT" TO A NEUTRAL AND COMPETENT JUDGE IN OHIO'S MAYOR'S COURTS

## I. INTRODUCTION

The Ohio mayor's courts are often an unknown entity, but the estimated 545 mayor's courts<sup>1</sup> have an impact on the quality of justice available in Ohio. The mayor's court is a court of inferior jurisdiction in which the mayor, by virtue of his office, has the authority to decide cases involving misdemeanors occurring within the municipality. As an elected municipal official, the mayor is responsible for the management of municipal affairs.<sup>2</sup> Since the mayor is also responsible, directly or indirectly, for fiscal affairs, the chance to increase the village coffers through fines resulting from convictions could be a real temptation. Thus, there is an inherent conflict of interest between the executive and judicial roles of a mayor-judge, which prevents him from being a "neutral and detached" magistrate as required by due process of law.<sup>3</sup>

The mayor's court may decide a variety of cases ranging from petty crimes, such as a speeding violation, to serious offenses, such as driving while intoxicated. A variety of legal issues may be involved in a misdemeanor trial. The resolution of these issues may mean the difference between an acquittal and a conviction, with the resulting loss of property and possible loss of liberty for the accused. The proper determination of these issues often requires the legal training of the mayor-judge. Therefore, it is essential that the requirements of a fair trial be implemented at a criminal hearing in mayor's court. If the accused is tried by a mayor who has no legal training, it may be impossible to afford the accused a fair trial, thus denying the accused the right to due process of law.

## II. THE MAYOR'S COURT SYSTEM IN OHIO

According to an unpublished memorandum of the Ohio State Bar Foundation, the typical mayor's court is located in a rural village with a population of 3,000 to 5,000 persons, conducts judicial hearings on a regular basis (weekly or biweekly), has an average caseload

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<sup>1</sup> Interview with Thomas Swisher, Director of Research of the Ohio State Bar Foundation, in Columbus, Ohio, January 21, 1975.

<sup>2</sup> See text accompanying note 28, *infra*.

<sup>3</sup> Ward v. Monroeville, 409 U.S. 57, 62 (1972).

of 435 cases a year, and collects approximately \$11,800 a year from fines levied by the mayor.<sup>4</sup>

The mayor's court is created by the authority of the General Assembly of Ohio to establish statutory courts as set forth in the Ohio constitution.<sup>5</sup> The General Assembly has provided by a statute that the mayor of a municipality may hear and decide cases involving violations of municipal ordinances and violations of the state traffic code occurring on state highways located within the municipality, if that municipality does not have a police court and is not the site of a municipal court.<sup>6</sup> The mayor can preside over a variety of cases ranging from minor traffic offenses to serious misdemeanors, but the types of offenses heard by the mayor are subject to certain restrictions. If the defendant is entitled to a jury trial on the charge and he pleads not guilty, the mayor cannot hear the case unless the defendant waives his right to trial by jury.<sup>7</sup>

### III. THE MAYOR'S INHERENT PECUNIARY INTEREST IN OBTAINING CONVICTIONS

The first constitutional defect of the mayor's courts is the inherent pecuniary interest the mayor has in obtaining convictions, thus preventing him from being a "neutral and detached" judge as required by due process of law. The United States Supreme Court has established certain guidelines which are related to the judicial administration of the mayor's courts.

In 1927 the Court decided the leading case of *Tumey v. Ohio*,<sup>8</sup> in which the defendant was charged with a misdemeanor and subsequently convicted and fined by the mayor of North College Hill, Ohio. A portion of the mayor's salary was derived from the fines he levied in the mayor's court. The Court held that the practice of allowing part of the mayor's salary to be dependent on whether or

<sup>4</sup> Interview with Thomas Swisher, Director of Research of the Ohio State Bar Foundation, in Columbus, Ohio, January 21, 1975.

<sup>5</sup> Ohio Const. art. IV, § 1 provides that "the judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas . . . and such other courts inferior to the supreme court as may from time to time be established by law."

<sup>6</sup> OHIO REV. CODE ANN. § 1905.01 (Page 1968). A conviction for violation of a municipal ordinance can lead to a prison term of up to six months and a fine of up to one thousand dollars, UPPER ARLINGTON, OHIO, CODE § 501.09 (1968).

<sup>7</sup> OHIO REV. CODE ANN. § 2937.08 (Page 1975). A further restriction, OHIO REV. CODE ANN. § 2945.17 (Page 1975) is that "[a]t any trial, in any court, for the violation of any statute . . . or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury."

<sup>8</sup> 273 U.S. 510 (1927), *rev'g* 115 Ohio St. 701, 155 N.E. 698 (1926).

not a conviction was obtained was a violation of due process of law.<sup>9</sup> The Court established a far-reaching rationale when it declared that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies . . . due process of law."<sup>10</sup>

A year after the *Tumey* decision the Court decided *Dugan v. Ohio*.<sup>11</sup> *Dugan* involved the Xenia, Ohio, mayor's court. Unlike the situation in *Tumey*, the Xenia mayor had little executive power and his salary was not dependent on fines which he imposed. The Court found that the mayor's relation with the executive branch and his financial interest in obtaining convictions were too remote to invoke the *Tumey* rationale.<sup>12</sup>

The *Tumey* rationale was again applied some forty years later in *Ward v. Monroeville*.<sup>13</sup> As in *Dugan*, the Monroeville mayor's salary was not dependent upon the fines he imposed; however, the mayor had wide executive powers,<sup>14</sup> and fines collected in mayor's court comprised a large part of the village's revenue.<sup>15</sup> The Court, in applying the *Tumey* "possible temptation" test to determine whether the mayor should be disqualified,<sup>16</sup> concluded that the mayor's duties concerning village finances "may make him partisan to maintain the high level of contribution from the mayor's court."<sup>17</sup> Such a situation clearly constituted a violation of due process of law.<sup>18</sup>

In 1973 the Ohio supreme court in *State ex rel. Brockman v. Proctor*<sup>19</sup> confronted the issue of the constitutionality of mayor's courts. The mayor in *Brockman* was a member of the community's legislative body. He exercised little executive power, since most of the city's executive functions were performed by an appointed city manager. The Ohio court concluded that *Brockman* did not violate *Tumey* or *Ward*, since the mayor in question exercised little executive

<sup>9</sup> 273 U.S. at 532.

<sup>10</sup> *Id.*

<sup>11</sup> 277 U.S. 61 (1928), *aff'g* 117 Ohio St. 503, 159 N.E. 477 (1927).

<sup>12</sup> 277 U.S. at 65.

<sup>13</sup> 409 U.S. 57 (1972), *rev'g* 27 Ohio St. 2d 179, 271 N.E.2d 757 (1971).

<sup>14</sup> *Id.* at 58.

<sup>15</sup> "[I]n 1964 this income contributed \$23,589.50 of total village revenues of \$46,355.38; in 1965 it was \$18,508.95 of \$46,752.60; in 1966 it was \$16,085 of \$43,585.13; in 1967 it was \$20,060.65 of \$53,931.43; and in 1968 it was \$23,439.42 of \$52,995.95." *Id.* at 58.

<sup>16</sup> 42 CIn. L. REV. 367, 370 (1973). *See* 409 U.S. at 60.

<sup>17</sup> 409 U.S. at 60.

<sup>18</sup> *Id.*

<sup>19</sup> 35 Ohio St. 2d 79, 298 N.E.2d 532 (1973). *See* 5 ST. MARY'S L.J. 856 (1974).

power.<sup>20</sup> The Ohio court also reasoned that the facts in *Brockman* and *Dugan* were "exactly in point"<sup>21</sup> and therefore the mayor was not disqualified from presiding as judge in mayor's court.

The *Brockman* majority refused to confront directly the issue of the existence of the mayor's courts as a violation of due process of law. The majority opted to exercise judicial restraint, invoking the doctrine of separation of powers: "if this court were to reach out to declare all mayors' courts' jurisdiction to try criminal cases unconstitutional it would be an unwarranted invasion of the power vested in the General Assembly by the Constitution."<sup>22</sup> This quotation identifies the problem concerning the Ohio mayor's courts. The Ohio supreme court, feeling constrained by the Ohio constitution, refused to proceed outside the specific guidelines established by the United States Supreme Court. In turn, the General Assembly refuses to act affirmatively because of the possible political repercussions involved if it were to abolish part of the fiefdom of the mayor, who is often a powerful local political figure.

Justice Corrigan, dissenting in *Brockman*, advocated expanding the *Tumey-Ward* rationale to all Ohio mayor's courts. He said:

Once the principle is recognized that *a mayor's impartiality may be affected by the fact that monies collected in his court go into the general operating fund of the municipality, that fact alone is sufficient to disqualify him as a judicial officer presiding over the mayor's court*, irrespective of the extent to which he participates in the management of the financial affairs of the municipality and the percentage of the municipal revenue which is derived from his court.<sup>23</sup> (emphasis in the original)

The fines imposed by the mayor can be an important part of municipal revenues, as demonstrated in *Ward*.<sup>24</sup> If a person is charged with a violation of a state statute and he is convicted or forfeits bail or a deposit, the monies are paid into the county treasury; however, if a person is charged with violation of a municipal ordinance and he is convicted or forfeits bail or a deposit, the monies collected are paid into the municipal treasury.<sup>25</sup> This situation encourages the municipal police to charge offenders with violation of municipal ordinances whenever possible. The mayor's courts are even exempted from turn-

<sup>20</sup> *Id.* at 84, 298 N.E.2d at 536.

<sup>21</sup> *Id.* at 83, 298 N.E.2d at 535.

<sup>22</sup> *Id.* at 84, 298 N.E.2d at 536.

<sup>23</sup> *Id.* at 92, 298 N.E.2d at 540 (Corrigan, Celebrezze, and Brown, JJ., dissenting).

<sup>24</sup> See note 15 *supra*.

<sup>25</sup> OHIO REV. CODE ANN. § 733.40 (Page 1954).

ing over the monies derived from the court for the maintenance of the county law library.<sup>26</sup> The result is that the entire amount of fines collected in the mayor's court is used within the particular community. The village fathers of Monroeville demonstrated how important these funds were to the community when they drafted a resolution vigorously protesting proposed state legislation reducing the jurisdiction of the mayor's court.<sup>27</sup>

Ohio permits a variety of forms of municipal government.<sup>28</sup> Generally the permissible forms produce two classes of executives, "strong" mayors and "weak" mayors. The "strong" mayor is the chief executive of the community, and he wields a great deal of power.<sup>29</sup> The "weak" mayor by contrast has little direct executive power, and he is often merely a member of the legislative body who has been chosen as mayor by the other members of the legislative body to perform certain ceremonial functions.<sup>30</sup> Strictly speaking, the *Tumey-Ward* rationale applies only to the "strong" mayor form of government. Extending the *Tumey-Ward* rationale to the "weak" mayor form of government is appropriate, once it is realized that the

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<sup>26</sup> OHIO REV. CODE ANN. § 3375.50 (Page 1972), requires that a certain amount of monies accrued from fines and bail forfeitures in municipal courts be paid to the trustees of the county law library. The Ohio supreme court in *Greenville Law Library Ass'n v. Ansonia*, 33 Ohio St. 2d 3, 292 N.E.2d 880 (1973), decided that the statute does not apply to mayor's courts.

<sup>27</sup> 409 U.S. at 58-59 n.1. The resolution read in part that "this legislation may cause such reduction in revenue to this village that an additional burden may result in increased taxation and/or curtailment of services essential to the health, welfare and safety of this village."

<sup>28</sup> A municipal corporation may choose to organize a charter government, OHIO CONST. art. XVIII, § 7, in which case the duties of the mayor are determined by the charter. A non-charter municipality may choose to organize under one of the three statutory schemes: "commission plan", OHIO REV. CODE ANN. § 705.41 (Page 1954); "city manager plan", OHIO REV. CODE ANN. § 705.51 (Page 1954); or the "federal plan", OHIO REV. CODE ANN. § 705.71 (Page 1954). Generally the powers of the mayor in a charter government will often be similar to one of the three statutory schemes.

<sup>29</sup> The "strong" mayor is usually confined to the "federal plan", OHIO REV. CODE § 705.71 (Page 1954), or to a charter city in which the mayor exercises a great deal of executive or administrative functions.

<sup>30</sup> The "commission plan" and the "city manager plan" or a similar type of city government charter are the typical "weak" mayor forms of government. The "commission plan", OHIO REV. CODE ANN. § 705.41 (Page 1954) provides for a commission made up of members elected by the community. The commission as a body exercises both legislative and executive functions. If a mayor is chosen, he is a member of the commission and is selected by the commission to perform the ceremonial functions of the office; he is one among equals. The "city manager plan", OHIO REV. CODE ANN. § 705.51 (Page 1954), provides for the election of council members by the community, and the council in turn hires a professional city manager to run the day to day affairs of the community. While theoretically the council is a legislative-executive body, it has delegated much of its executive authority to the appointed city manager. The chairman of the council exercises the judicial functions of the office of mayor, OHIO REV. CODE ANN. § 705.55 (Page 1954), and he is also one among equals.

"possible temptation" test would apply to the "weak" mayor, since he might also be prone toward tipping the scales of justice toward conviction. Undoubtedly, the "strong" mayor is directly concerned with the fiscal management of the community, but the "weak" mayor as a member of the commission or council is also responsible for municipal fiscal affairs. The mayor's and the commissioners' chances for re-election may often be influenced by the soundness of the municipal fiscal policy and the time which has elapsed since the last tax raise was imposed. The "weak" mayor might be tempted to lean toward conviction and the resulting revenue in order to enhance his and his colleagues' chances for re-election because of the strong fiscal position of the community. "Since no one commissioner . . . in . . . the weak mayor forms is ultimately responsible for municipal affairs, and each may share in making executive decisions, each of these officials might be so concerned about municipal finances that he would be too partial to serve as judge . . . ."<sup>31</sup>

While at common law any financial interest that the judge might have had in the outcome of the case, no matter how slight, was enough to disqualify him,<sup>32</sup> such has not been the case in the United States. The *Tumey-Ward* rationale requires that the disqualifying interest must be a direct pecuniary interest and not too remote.<sup>33</sup> The *Tumey* court adopted a narrow view of the potential for conflict of interest when it held that the mere union of the executive and judicial powers in the mayor does not per se violate due process of law.<sup>34</sup> Unfortunately the Court has yet to directly expand the *Tumey-Ward* logic to find that the mayor, whether a "weak" or "strong" mayor, has an inherent pecuniary interest in obtaining convictions and as a result is disqualified to act as a judicial officer in mayor's court.

The reason for extending the rationale can be drawn from a brief discussion of the related area of corporate affairs. A judge who is an

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<sup>31</sup> 42 CIN. L. REV. 367, 374 (1973).

<sup>32</sup> Bonham's Case, 2 Brown 225 (1610).

<sup>33</sup> 273 U.S. at 523.

<sup>34</sup> *Id.* at 534. See *Poynter v. Walling*, 54 Del. 409, 177 A.2d 641 (1962); *La Guardia v. Smith*, 288 App. Div. 1, 41 N.E.2d 153 (N.Y. 1942) and *Eckerson v. Des Moines*, 137 Iowa 452, 115 N.W. 177 (1908), which held that the vesting of the mayor with both executive and judicial powers was not unconstitutional. But see, *Howard v. Harrington*, 114 Me. 443, 96 A. 769 (1916). Cf. *People v. Kessler*, 77 Misc. 2d 640, 354 N.Y.S.2d 517 (Suffolk County Ct. 1974), in which the court disqualified a justice of the peace from hearing a case because the defendant was charged with violation of an ordinance enacted by a legislative council of which the justice of the peace was a member. *Contra*, *State v. Collins*, 24 R.I. 242, 52 A. 990 (1902); *State v. Wright*, 81 Vt. 281, 69 A. 761 (1908).

official of a corporation is disqualified to hear a case in which the corporation has a pecuniary interest, because his duty to promote the best interests of the corporation clashes with the impartiality required of him as a judge.<sup>35</sup> While a corporate official acting as a judge in a matter concerning the corporation raises many different problems, an analogy can be drawn for the disqualification of all mayor-judges. A municipal official undoubtedly has a similar duty to promote the best interests of the municipality. One of the most important interests of the municipality is to maintain a strong fiscal position in order to provide adequate services to the citizenry. Politically, the mayor, whether a "weak" or "strong" mayor, must attempt to maintain a low tax rate while providing adequate services, or face the voters' wrath. The mayor has an opportunity to achieve this goal in an inoffensive manner by using convictions in the mayor's court to increase the village revenues.

The *Ward* opinion seems to indicate that there is some due process line which, if crossed, will result in the disqualification of the mayor-judge. However, the *Ward* Court gave no clear guidance in this matter. The Court did not overrule *Dugan* or directly answer the question of whether all mayor's courts are unconstitutional.

Arguably there might be situations when the mayor's interest is too remote to invoke the *Tumey-Ward* rationale, or in which the political considerations for obtaining needed revenue by increasing convictions in the mayor's court are nonexistent. Unfortunately, the Court has failed to give any definite guide as to when these situations might arise. The *Ward* Court "seems to leave the question open for future consideration because it merely distinguishes [*Ward*] . . . from the *Dugan* case without affirming or disavowing it."<sup>36</sup>

The *Tumey-Ward* rationale requires the disqualification of a mayor in "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant . . . ."<sup>37</sup> It would not be unreasonable to imagine a mayor being tempted toward conviction and its resulting revenue to alleviate the community's financial difficulties. Because of the mayor's unique position as a judicial official and as an executive and/or a legislative official he cannot help but be a biased judge. The

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<sup>35</sup> 46 AM. JUR. 2d *Judges* § 127 (1969). See Appeal of Askounes, 144 Pa. Super. 293, 298, 19 A.2d 846, 848 (1941), which stated that the judge's "membership on the board of trustees of a college will disqualify him from sitting in a case the outcome of which will affect its financial affairs. . . ."

<sup>36</sup> 42 CIN. L. REV. 367, 374 (1973).

<sup>37</sup> 273 U.S. at 532.

positions lead to a conflict of the roles, for the mayor as judge must seek justice, but the mayor as a community official must attempt to maintain a strong fiscal position.

#### IV. THE LACK OF LEGAL TRAINING OF THE NON-LAWYER MAYOR AS A VIOLATION OF DUE PROCESS OF LAW

The defendant in mayor's court is not guaranteed a judge trained in the law,<sup>38</sup> as he is in other Ohio courts.<sup>39</sup> This gives rise to several problems. The mayor must deal with a variety of legal issues that arise at a criminal hearing, such as: advising the defendant of his rights, admitting the proper evidentiary matter, and applying the legal precedents. The criminal defendant who is tried before a mayor who has no legal training may not receive a fair trial because the non-lawyer judge is often unable to understand the full impact of these legal issues.

##### A. *Advising the Criminal Defendant of His Rights*

A critical area in a misdemeanor trial is advising the defendant of his constitutional and statutory rights.<sup>40</sup> The judge has the duty to

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<sup>38</sup> OHIO REV. CODE ANN. § 733.02 (Page 1954) provides that the only qualification for the office of mayor is that an individual be an elector of the city. OHIO REV. CODE ANN. § 3503.01 (Page 1972) defines a qualified elector: "[e]very citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state six months, of the county thirty days, and of the voting precinct thirty days . . . may vote at all elections."

<sup>39</sup> The statutes providing for the qualification of the various state judges require each judge to have a certain amount of legal training before he can become a member of the bench. OHIO REV. CODE ANN. § 1907.051 (Page 1968, Supp. 1974), provides that every county judge "shall have been admitted to the practice of law in this state and shall have been for a total of at least two years preceding his appointment or commencement of his term, engaged in the practice of law in this state." This section only affects county judges newly elected after November 1, 1962. There are presently two non-lawyer county court judges in Ohio. OHIO REV. CODE ANN. § 1901.06 (Page 1968, Supp. 1974), provides that each municipal court judge "shall have been admitted to the practice of law in this state and shall have been, for a total of at least six years preceding his appointment or commencement of his term, engaged in the practice of law in this state." Similar provisions govern the qualifications of judges of the common pleas courts: OHIO REV. CODE ANN. § 2301.01 (Page 1954, Supp. 1974); courts of appeal, OHIO REV. CODE ANN. § 2501.02 (Page 1954, Supp. 1974); supreme court, OHIO REV. CODE ANN. § 2503.01 (Page 1954, Supp. 1974). To be admitted to the practice of law in Ohio an individual must be 21 years of age, have earned a bachelor's degree from an accredited college, have earned a law degree from a law school approved by the ABA, and have passed the Ohio Bar Exam, OHIO R. GOV. BAR I.

<sup>40</sup> Among these rights are: the right to counsel, U.S. CONST. amend. VI, *Gideon v. Wainwright*, 372 U.S. 335 (1963), OHIO CONST. art. I, § 10; the right to trial by jury in all cases but petty offenses, U.S. CONST. amend. VI, *Duncan v. Louisiana*, 391 U.S. 145 (1968), OHIO CONST. art. I, § 10, *see note 5 supra*; the right of confrontation of witnesses, U.S. CONST. amend. VI, *Pointer v. Texas*, 380 U.S. 400 (1965), OHIO CONST. art. I, § 10; the privilege



properly advise the accused of his rights and to determine if the defendant has constitutionally waived those rights.<sup>41</sup>

The very serious and important task of advising the defendant of his rights and accepting any waiver of these rights is even more important when the accused is without aid of legal counsel, as is often the case in mayor's court.<sup>42</sup> The accused is entitled to know that he has certain rights, and this goal can only be achieved if the advising judge also knows the defendant's rights. In Ohio there is no requirement that the mayor-judge have even the vaguest notion of what the various constitutional and statutory rights are. By contrast, due to the legal education required of all other Ohio judges,<sup>43</sup> they are almost certain to be familiar with the defendant's rights and with the requirements for a constitutionally valid waiver of these rights.

The rebuttal to this argument is that advising the defendant of his rights is merely to put the defendant on notice, and thus requires nothing more than merely communicating to the accused that he has certain rights. Furthermore, petty misdemeanor cases, which comprise the bulk of cases decided in mayor's court, do not require strict adherence to the various constitutional rights for the protection of the accused and such adherence would only be burdensome to the already overcrowded court system. The Rules of Criminal Procedure and the Traffic Rules provide for less detailed advice to be given to the accused who is pleading guilty or no contest to a petty crime rather than a serious misdemeanor or felony.<sup>44</sup>

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against self-incrimination, U.S. CONST. amend. V, *Malloy v. Hogan*, 378 U.S. 1 (1964), OHIO CONST. art. I, § 10; the right of the accused to demand the nature and the cause of the accusation against him, U.S. CONST. amend. VI, OHIO CONST. art. I, § 10, and the right to have compulsory process to procure the attendance of witnesses in behalf of the defendant, U.S. CONST. amend. V, OHIO CONST. art. I, § 10. The Cuyahoga County Court of Appeals in *Cleveland v. Whipkey*, 29 Ohio App. 2d 79, 278 N.E.2d 374 (1972), concluded that in a misdemeanor trial the defendant is entitled to the same rights afforded to a felony defendant. OHIO R. CRIM. P. 10 (C), and OHIO TRAF. R. 8 (D) require that the defendant similarly be advised of his constitutional right.

<sup>41</sup> A guilty plea operates as a waiver of certain constitutional rights, *Boykin v. Alabama*, 395 U.S. 238 at 242 (1969). A waiver of constitutional rights must be voluntarily, intelligently, and knowingly made, *Brady v. United States*, 397 U.S. 742 at 748 (1970). *Cleveland v. Whipkey*, 29 Ohio App. 2d 79, 83, 278 N.E.2d 374, 378 (1972).

<sup>42</sup> In an observation of the Upper Arlington, Ohio mayor's court, only two defendants were represented by counsel out of approximately thirty defendants.

<sup>43</sup> See note 39 *supra*.

<sup>44</sup> OHIO R. CRIM. P. 11(C) provides that

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, or . . . by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of

While there is some confusion as to how extensive the constitutional rights are in a misdemeanor trial, the accused is guaranteed certain basic constitutional rights.<sup>45</sup> The judge in a petty case may be called upon to decide if a defendant has waived his rights within the constitutional framework. This task requires an understanding of these constitutional rights.

### B. *Applying the Rules of Evidence*

If the accused invokes his right to plead not guilty, he is entitled to a fair trial and the procedural safeguards offered by the rules of evidence. The law of evidence is a product of the jury system.<sup>46</sup> Even if it is acknowledged that, since a mayor cannot preside over a jury trial<sup>47</sup> and therefore the rules of evidence should be relaxed, a certain

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no contest, and shall not accept such plea without first addressing the defendant personally and:

(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is eligible for probation.

(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

(c) Informing him and determining that he understands that by his plea he is waiving his right to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

OHIO R. CRIM. P. 11(D), relating to misdemeanor cases involving serious offenses, provides that

the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing him of the effect of the pleas of guilty, no contest, and not guilty and determining that he is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, or . . . by appointed counsel, waives this right.

With regard to petty offenses Ohio Crim. R. 11(E) provides that "the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty." The defendant does not have to be readvised of his right to retained counsel or, if he is unable to obtain counsel, to appointed counsel.

OHIO TRAF. R. 10(C) and (D) provide for similar advice to be given to the defendant in a serious misdemeanor case and in a petty misdemeanor case, analogous to the Criminal Rules.

<sup>45</sup> 29 Ohio App. 2d at 84, 278 N.E.2d at 378. In some instances the rights in petty and serious offenses may differ in certain respects, *e.g.*, the right to a jury trial in a petty offense is not constitutionally guaranteed as in serious offenses. *See Duncan v. Louisiana*, 391 U.S. 145 (1968). *See* Section VI *infra*, for a discussion of the right to counsel in a misdemeanor case.

<sup>46</sup> C. MCCORMICK, EVIDENCE § 60 at 137 (1945).

<sup>47</sup> *See* note 7 *supra*.

minimum level of competency should nevertheless be required of the mayor-judge.<sup>48</sup> The purpose of evidence is to inform the court of the material facts that are involved in the controversy so that the truth may be determined and a fair result reached.<sup>49</sup> The rules of evidence have developed in order to elicit the truth from the evidence produced in the case.<sup>50</sup> This can occur only if the presiding official is aware of the rules of evidence and applies them properly.

In the traditional adversary proceeding the defendant's counsel will object to the violation of the rules of evidence by the prosecution, but in the mayor's court the defendant is often without aid of legal counsel.<sup>51</sup> In such a situation the prosecution may be able to elicit unreliable evidence (*e.g.*, hearsay) from a witness without the defendant and lay mayor being aware of its objectional nature. Such unreliable evidence might bias the lay mayor's determination of the case. In essence, the mayor is fashioning his own rules of evidence, which may weigh heavily against the defendant.<sup>52</sup> In a criminal prosecution the burden of proof is on the state;<sup>53</sup> this requirement benefits the defendant. A mayor, untrained in the law, might be unaware of the great burden cast upon the prosecution. In a criminal hearing, especially when the case is prosecuted by an attorney rather than a complaining police officer and when the accused is unrepresented by counsel, the defendant should be given *every* possible opportunity for a fair hearing. The only protection the defendant has is a competent judge to prevent violations of the rules of evidence which would be detrimental to him.<sup>54</sup>

Arguably the lack of adherence to the rules of evidence might work to the defendant's advantage, since the accused would not be

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<sup>48</sup> Cf. McDonald, *South Carolina Magistrates: Justice Under a Willow Tree*, CIVIL LIBERTIES, April 1975 at 4. The article contains a general discussion of the legal inequities that result in trials conducted by lay magistrates.

<sup>49</sup> 29 AM. JR. 2D *Evidence* § 1 (1967).

<sup>50</sup> *Id.*

<sup>51</sup> See note 42 *supra*.

<sup>52</sup> Cf. Columbus Dispatch, April 25, 1975 at 4, col. 3, which reported that the municipal court judge of Skiatook, Oklahoma refused to accept a not guilty plea of the defendant, James P. Miller, Jr. Judge Harvey Wilson was quoted as saying, "You're guilty, you'll have to plead guilty and pay your fine. There will be no trial." OKLA. STAT. ANN. tit. 11 § 958.7 (b),(c) (Supp. 1974), allows the mayor of the community of less than 7,500 to appoint "any suitable and proper person" to act as judge if there is no attorney residing in the county who is willing to accept the position. According to U.S. Dep't of Commerce, County and City Data Book 1972, 901 (1973), Skiatook had a population of 2,930 in 1970. There is no record of Harvey Wilson being admitted to the practice of law in Oklahoma, Frances Kennemer, Deputy Clerk of the Supreme Court of Oklahoma, May 7, 1975.

<sup>53</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>54</sup> *Contra*, *Ditty v. Hampton*, 490 S.W.2d 772 at 775 (Ky. 1973).

subject to the rules of evidence. Since the defendant is likely to be as legally unsophisticated as the lay judge, this might cause the judge to favor the defendant in his determination. The accused might be able to present wholly irrelevant but emotionally charged testimony and sway the judge who is not concerned with the requirements of evidence. Thus, the advantages that the prosecution might gain in a tribunal that does not adhere to the law of evidence may be balanced by similar advantages afforded to the defendant.

Nevertheless, the mayor's awareness of the rules of evidence is necessary. Strict adherence to the rules need not be rigidly enforced,<sup>55</sup> but the mayor should be aware of what evidence to admit and the weight to be given to that evidence. The mayor in making this determination has a duty to seek the truth from the various facts presented to him. A layman can not be expected to adequately apply the rules of evidence to aid him in his determination of the truth.

### *C. Understanding the Importance of Legal Precedent in a Criminal Trial*

The typical layman is unfamiliar with the rules of law that have emerged over the years or that have been dictated by statute which often guide the lawyer-judge in his determination.<sup>56</sup> Without an understanding of the importance of legal precedent the lay judge is capable of applying only his notion of right and wrong to reach his decision.<sup>57</sup> This results in deciding every case as a unique proposition without relying on precedent and relevant statutes to guide him to a correct decision.

There are many legal issues which may arise at a trial in mayor's court which would require the application of various rules of law. A first amendment issue relating to free speech can easily arise in mayor's court.<sup>58</sup> A layman is not likely to be aware of the numerous federal and state decisions relating to the scope of the first amendment. Another area of concern is the suppression of evidence illegally seized. It is highly complex law and a layman is not likely to be aware of or have an understanding of court decision relating to this area of the law. The mayor might also be called upon to determine whether a statute covers the defendant's conduct, without having the ability

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<sup>55</sup> 29 AM. JUR. 2D *Evidence* § 1 (1967). See Levin & Cohen, *The Exclusionary Rules in Nonjury Criminal Cases*, 119 U. PA. L. REV. 905 (1971).

<sup>56</sup> Smith, *The Justice of the Peace System in the United States*, 15 CALIF. L. REV. 118 at 128 (1927).

<sup>57</sup> *Id.* at 129.

<sup>58</sup> See *Bowling Green v. Lodico*, 11 Ohio St. 2d 135, 228 N.E.2d 325 (1967).

to properly interpret the language of the statute. The protections afforded by these rules are likely to be absent in a trial where the judge is unaware of them due to his lack of legal training.

It could be argued that these propositions are *de minimis*. Since many of the cases tried in the mayor's court involve petty misdemeanors, the legal complications presented by precedent are relatively minor. In a petty offense the judge is usually not confronted with constitutional issues or the construction of statutes. Also, even if the accused is charged with a serious misdemeanor, in which he is entitled to a jury and has the option to proceed directly to a court of record, he waives his "right" to a qualified and competent judge by electing to remain in mayor's court.

However, legal precedent, criminal law, and constitutional law are all vital elements in a criminal trial. The constitutional requirements of a fair trial require the implementation of these elements. Because of the general lack of legal training required of the mayor, such protections can not exist in mayor's court.

#### D. *A Fair Trial Requires a Judge Trained in the Law*

Due process of law is an important element that must be met in all courts, no matter how minor the court. "[T]here is a serious question whether the part-time lay judge can appreciate or comprehend the complex procedural requirements of due process."<sup>59</sup> When an individual may lose his liberty or property because of an adverse decision in a criminal proceeding, strict adherence to the various legal and procedural elements of due process should be required. The eminent Roscoe Pound, commenting on the lack of legal qualifications of lay administrative judges, said: "They are likely to have the layman's idea that the decision is an easy task involving no acquired expertness through training and experience and to be conscientiously unconscious of what the lawyer soon learns, namely, that there are two sides to every case."<sup>60</sup>

Recently the California Supreme Court in *Gorden v. Justice Court*<sup>61</sup> recognized that even in a misdemeanor trial complicated issues of law and procedure are likely to be involved which a lay judge cannot be assumed to comprehend.<sup>62</sup> The court concluded that,

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<sup>59</sup> Comment, *Constitutional Challenge to the Justice of the Peace Court in Mississippi*, 44 Miss. L. J. 996, 1006 (1973).

<sup>60</sup> A.B.A.J. 664, 670 (1941).

<sup>61</sup> 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), cert. denied, 420 U.S. 938 (1975).

<sup>62</sup> 12 Cal. 3d at 328, 525 P.2d at 75, 115 Cal. Rptr. at 635. Unlike the Ohio situation a lay candidate for justice of the peace in California is required to pass a three hour exam covering a wide area of the law.

"[s]ince our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process."<sup>63</sup>

As Roscoe Pound noted, there are two sides to every issue; not all state courts agree with the *Gorden* court's conclusion. The Kentucky Court of Appeals in *Ditty v. Hampton*<sup>64</sup> rejected the idea that the right to counsel leads to the conclusion that a defendant has a right to be tried before an attorney-judge in criminal cases. The court reasoned that the right to counsel was for the purpose of protecting the defendant from his adversary the prosecution, rather than from the nonadversary, neutral and impartial judge.<sup>65</sup>

Nevertheless, a criminal defendant is entitled to due process of law in all steps of the judicial process of a criminal proceedings. Due process of law requires a minimum standard of judicial competence of a mayor when he is exercising a judicial function. "[A]n assumption that the office is not so important as to require judicial knowledge ignores basic realities of judicial administration."<sup>66</sup> While a conviction in mayor's court is not final since an appeal from the court may be taken as a trial *de novo*,<sup>67</sup> "[a]n undue burden is placed upon a defendant when he must bear the expense and inconvenience of an appeal in order to receive a fair trial before a qualified and impartial judge."<sup>68</sup> The United States Supreme Court in *Ward* also rejected the "procedural safeguards" offered by a trial *de novo*, holding this did not guarantee a fair trial in mayor's courts.<sup>69</sup>

## V. THE LACK OF LEGAL TRAINING OF THE NON-LAWYER MAYOR AS A VIOLATION OF EQUAL PROTECTION OF THE LAW

The General Assembly of Ohio has made the determination that all Ohio judges except the mayor, fulfill certain educational standards including the possession of a law degree.<sup>70</sup> The General Assembly has

<sup>63</sup> 12 Cal. 3d at 332, 525 P.2d at 78, 115 Cal. Rptr. at 638. See Section VI, *infra*.

<sup>64</sup> 490 S.W.2d 772 (Ky. 1972), *appeal dismissed*, 414 U.S. 885 (1973); *Ditty* was reaffirmed in *North v. Russell*, 516 S.W.2d 103 (Ky. 1974), *vacated and remanded*, 419 U.S. 1085 (1974), *aff'd*, No. 74-723 (Ky., March 21, 1975), *probable jurisdiction noted*, 422 U.S. 1040 (1975); see note 79, *infra*.

<sup>65</sup> 490 S.W.2d at 775. See Section VI, *infra*.

<sup>66</sup> Comment, *Constitutional Challenge to the Justice of the Peace Court in Mississippi*, 44 Miss. L. J. 996, 1007 (1973).

<sup>67</sup> OHIO REV. CODE ANN. § 1905.25 (Page 1974), provides that "[a]n appeal from mayor's court to the municipal court or county court shall proceed as a trial *de novo*."

<sup>68</sup> Comment, *Constitutional Challenge to the Justice of the Peace Court in Mississippi*, 44 Miss. L. J. 996, 1007 (1973).

<sup>69</sup> 409 U.S. at 61-62.

<sup>70</sup> See note 39 *supra*.

also made the determination that admission to the state bar is not the sole criterion to allow a person to function as a judge; in addition, the prospective judge must have actively practiced law in Ohio for two to six years, depending on the court to which he is seeking election.<sup>71</sup> These requirements are an indication that legal education and legal experience are deemed essential to the administration of justice by the legislature. The justice that should be administered in the mayor's court is no different from the justice administered in a municipal court; both courts often decide similar types of cases. As previously discussed the lay mayor is not likely to be able to implement fully the procedural and substantive elements necessary for a fair trial. However, if the defendant is tried in a municipal court, these legal elements are more likely to be implemented. The result is the quality of justice available to the defendant depends principally on where he is tried. This result denies the defendant equal protection under the law.

In applying the equal protection clause, the Supreme Court has utilized different tests to determine if the legislation in question is constitutional. Under the traditional "rational basis" test the classification established by the state (those persons tried in mayor's courts) must relate to a legitimate government purpose.<sup>72</sup> The "strict scrutiny" test is utilized when fundamental rights are in question.<sup>73</sup> This standard requires that the legislation in question must promote a compelling state interest.<sup>74</sup> Finally, in criminal cases that involve the equal protection clause, the Court has often utilized a test which prohibits "unreasonable distinctions" among classes of criminal defendants.<sup>75</sup>

Providing the citizenry with a local forum for the administration of justice undoubtedly meets all of the equal protection tests. The mayor's courts do provide the populace with some form of local "justice." However, under all the tests, the inequities caused by a trial conducted by a non-attorney outweigh the "benefits" of a locally available form of justice. The guarantee of a fair trial is "the most fundamental of all freedoms"<sup>76</sup> and a fair trial is a basic requirement of due process.<sup>77</sup> No legitimate governmental purpose is served by

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<sup>71</sup> *Id.*

<sup>72</sup> *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949).

<sup>73</sup> *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

<sup>74</sup> *Id.*

<sup>75</sup> *Mayer v. Chicago*, 404 U.S. 189, 196 (1971).

<sup>76</sup> *Estes v. Texas*, 381 U.S. 532, 540 (1965).

<sup>77</sup> *In re Murchison*, 349 U.S. 133, 136 (1965).

granting the accused a less fair trial solely because of geographic convenience. Perhaps "strict scrutiny" is the proper test since the fundamental right of a fair trial is involved.<sup>78</sup> Under this analysis the state would be unable to show a compelling state interest that would justify infringing on the right to a fair trial merely for local convenience. There is also an "unreasonable distinction" made among the class of defendants who are tried for misdemeanor violations in Ohio. The accident of geography is the controlling factor as to whether the accused may be tried by a non-lawyer rather than a lawyer. The location of the trial bears no legitimate, compelling or reasonable relation to the differentiation among defendants charged with the same offense, and cannot justify the denial of a legally trained judge to those defendants tried in a mayor's court.

## VI. THE RIGHT TO A LAWYER-JUDGE?

The United States Supreme Court has not directly decided the issue of whether a person has the right to be tried by a lawyer-judge in criminal matters (the Court will have an opportunity to decide this issue in a case that was recently argued, *North v. Russell*<sup>79</sup>). The position taken in this Note is that a lawyer-judge is necessary for the administration of criminal justice. The Court has rendered decisions concerning the extent of the right to counsel in a criminal trial. These decisions may support or undercut the "right" to a lawyer-judge in a misdemeanor hearing.

The Court decided in *Gideon v. Wainwright*<sup>80</sup> that in a felony trial, in which the defendant is unable to obtain counsel, counsel must be provided to him unless he waives this right.<sup>81</sup> This logic was expanded in *Argersinger v. Hamlin*,<sup>82</sup> which involved a misdemeanor case in which the accused was without aid of counsel and sentenced to jail. The Court's reasoning was rather broad, stating that "[t]he requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution"<sup>83</sup> and "the problems associated with

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<sup>78</sup> But cf. *Rankin v. Shanker*, 23 N.Y.2d 111, 295 N.Y.S.2d 625, 242 N.E.2d 802 (1968), appeal dismissed, 396 U.S. 120 (1969). The New York Court of Appeals utilized the "rational basis" test to uphold state legislation that denied public employees the right to a jury trial in contempt proceedings.

<sup>79</sup> 516 S.W.2d 103 (Ky. 1974), vacated and remanded, 419 U.S. 1085 (1974), *aff'd*, No. 74-723 (Ky. March 21, 1975), probable jurisdiction noted, 422 U.S. 1040 (1975); argued Dec. 9, 1975, 44 U.S.L.W. 3357 (Dec. 16, 1975). The Kentucky court of appeals in affirming *North* relied on their decision in *Ditty v. Hampton*, 490 S.W.2d 772 (1972).

<sup>80</sup> 372 U.S. 335 (1963).

<sup>81</sup> *Id.* at 339-40.

<sup>82</sup> 407 U.S. 25 (1972).

<sup>83</sup> *Id.* at 33.



misdemeanors and petty offenses often require the presence of counsel to insure a fair trial.”<sup>84</sup> The holding, however, was rather narrow. The Court held that the right to appointed counsel, in a misdemeanor trial, exists only if the accused is sentenced to jail.<sup>85</sup>

It would seem to follow that an attorney-judge would be necessary in those cases in which the accused had the right to appointed counsel, so that the judge would be able to understand counsel’s arguments. Anything less would diminish the full effectiveness of counsel. Since legal counsel is often essential to a fair trial,<sup>86</sup> a lawyer-judge, who by his training is able to understand the legal arguments of counsel, is often essential to a fair trial.

The determination that the right to an attorney-judge exists when there is a right to an appointed counsel would have a significant impact in Ohio’s mayor’s courts. Ohio Criminal Rule 44 requires the appointment of counsel when the defendant is charged with a serious crime<sup>87</sup> and he is unable to obtain retained counsel. In a petty offense,<sup>88</sup> Criminal Rule 44 follows the *Argersinger* holding and provides that no jail sentence can be imposed unless the accused has legal counsel or he waives this right.<sup>89</sup> Thus, if the right to counsel is to be of any real value, the defendant must be guaranteed a lawyer-judge in all cases in which he is charged with a serious crime and he can not be sentenced to imprisonment unless he was tried by a lawyer-judge.<sup>90</sup>

This line of reasoning still does not guarantee a lawyer-judge to a defendant who is charged with a petty offense that carries no possibility of imprisonment. This type of offense makes up the bulk of the mayor’s courts’ case load. However, the absence of legal counsel does not end the inquiry as to the necessity for a lawyer judge. If a lawyer is not present at the trial, the defendant must turn to the judge in the hope that he will preserve his rights and implement the requirements necessary for a fair trial.

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<sup>84</sup> *Id.* at 36-37.

<sup>85</sup> *Id.* at 37. There is a right to retained counsel in criminal hearings. See U.S. CONST. amend. VI and OHIO CONST. art. I, § 10.

<sup>86</sup> L. HERMAN, THE RIGHT TO COUNSEL IN MISDEMEANOR COURT 28 (1973).

<sup>87</sup> OHIO R. CRIM. P. 2 defines a serious offense as “any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months.”

<sup>88</sup> OHIO R. CRIM. P. 2 defines a petty offense as “a misdemeanor other than a serious offense.”

<sup>89</sup> The Ohio Traffic Rules provides that the right to counsel as provided in the Criminal Rules apply in Traffic cases, OHIO TRAF. R. 10(C) and (D).

<sup>90</sup> The California supreme court in *Gorden* requires that the right to an attorney-judge exists when a possible sentence involves imprisonment, 12 Cal. 3d at 334, 515 P.2d at 79, 115 Cal. Rptr. at 639.

Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.<sup>91</sup>

Traditionally the judge is regarded as the silent, neutral and impartial presiding officer whose only function is to rule on motions and objections made by counsel. However, he is also charged with the administration of justice. This burden is increased when the accused is unrepresented by counsel. A lawyer-judge has the expertise necessary to guarantee the defendant that his constitutional rights<sup>92</sup> will be protected even if he is without aid of legal counsel. Therefore, in a criminal trial where the defendant has no right to an appointed attorney, a lawyer-judge is necessary for the full implementation of fairness and equality.

This argument does not exclude the "right" to an attorney-judge when the accused has a right to appointed counsel. The right to a lawyer-judge is an absolute right in all criminal cases. In trials where the defendant is guaranteed appointed counsel, the full effectiveness of counsel can only be achieved when the judge, by his legal training, is able to understand the legal arguments of counsel. In cases where the accused is not guaranteed appointed counsel or he does not have retained counsel, the attorney-judge is necessary since he is often the only person in the courtroom capable of protecting and understanding the constitutional rights of the accused and assuring him a fair trial.

The implementation of this "right" would not be as burdensome to the local sytem of justice as the full implementation of the right to appointed counsel might be. While the latter would require that each defendant would be represented by counsel, the former right would only require that each criminal court would be presided over by an attorney-judge.

## VII. POSSIBLE ALTERNATIVES TO THE MAYOR'S COURTS

The abolition of mayor's courts would not imply that the citizens' needs for a convenient and local form of justice would be overlooked. Nor would the abolition necessarily increase the case load of the already overburdened courts.<sup>93</sup> A type of "circuit riding" municipi-

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<sup>91</sup> *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

<sup>92</sup> See notes 41-42 *supra*.

<sup>93</sup> 35 Ohio St. 2d at 84, 298 N.E.2d at 536.

pal court judge has been suggested by commentators.<sup>94</sup> The statutes governing the municipal courts allow the court to hold sessions anywhere within its jurisdiction.<sup>95</sup> Depending on the particular municipal court, its jurisdiction may be county-wide, or confined to a particular township or city.<sup>96</sup> In the more populous counties a judge could travel to different geographic sections of the county periodically to preside over cases now handled by the mayor's courts. In counties where the judges are already overworked this could be accomplished by providing for an additional judicial seat; the elected judge's major function would be to "circuit ride." In counties with a less congested court calendar the duties of the "circuit rider" could be shared by all the judges on a rotating basis. In counties with few municipal court judges, "circuit riding" could be accomplished by a judge on a part-time basis (e.g., in the evening once or twice a week). If a county had no municipal courts or had municipal courts with a very limited geographic jurisdiction, the alternative would be to shift the burden of "circuit riding" to the part-time county court judges.<sup>97</sup>

The Traffic Rules provide another alternative to the mayor's court. Traffic Rule 14 allows a court to appoint referees, who must be attorneys-at-law, to perform many of the preliminary proceedings in traffic cases.<sup>98</sup> In certain cases the referee may decide contested traffic cases.<sup>99</sup> The use of referees could be extended to all types of misdemeanor cases that are presently decided in mayor's court. The increased reliance on referees coupled with required "circuit riding" of these officials would be a viable alternative to mayor's courts.

The Court in *Ward* implied another alternative to the present mayor's court system. The Court stated that it "intimate[d] no view that it would be unconstitutional to permit a mayor . . . to serve in essentially a ministerial capacity in a traffic or ordinance violation case to accept a free and voluntary plea of guilty or *nolo contendere*, a forfeiture of collateral, or the like."<sup>100</sup> Ohio supreme court Justice Corrigan, in his dissent in *Brockman*, also implied a similar alterna-

<sup>94</sup> Interview with Allan H. Whaling, Director of the Ohio Judicial Conference in Columbus, Ohio, January 21, 1975; interview with Joseph Yearling, Police Prosecutor of Upper Arlington, in Columbus, Ohio, April 3, 1975; interview with Richard Moore, Mayor of Upper Arlington, in Upper Arlington, Ohio, April 4, 1975.

<sup>95</sup> OHIO REV. CODE ANN. § 1901.021 (Page 1968). See McGovern, 1959 *Legislation Affecting the Minor Courts*, 20 OHIO ST. L.J. 623, 625 (1959).

<sup>96</sup> OHIO REV. CODE ANN. § 1901.02 (Page 1974).

<sup>97</sup> OHIO REV. CODE ANN. § 1907.01 et seq. (Page 1968).

<sup>98</sup> OHIO TRAF. R. 14, allows the referee to receive pleas, "statements in explanation and for mitigation of sentence and of recommending penalty to be imposed. . . ."

<sup>99</sup> *Id.*, the referee can only hear contested cases when the defendant consents in writing.

<sup>100</sup> 409 U.S. at 62, n.2.

tive.<sup>101</sup> Ministerial functions are those that are precisely defined and leave nothing to the discretion or judgment of the acting official,<sup>102</sup> while a judicial function requires that the acting official exercise discretion or judgment.<sup>103</sup> Vesting the mayor with a ministerial function in certain traffic and ordinance violation cases is an alternative to the present situation, constitutionally permissible within the holding of *Ward*. This alternative is further supported by the Court in *Shadwick v. Tampa*,<sup>104</sup> in which a layman clerk of courts was allowed to perform the limited "judicial" function of issuing arrest warrants so long as he was a "neutral and detached" official and capable of determining if probable cause existed.<sup>105</sup> Thus it follows that it would be constitutionally permissible for a layman to perform the ministerial function of accepting guilty pleas or fines in petty cases. This suggestion is a compromise between the present mayor's court and the complete elimination of the mayor's court.

Traffic Rule 13 provides for the establishment of a Traffic Violation Bureau in which the clerk of courts<sup>106</sup> may accept pleas of guilty and payment of fines and court costs.<sup>107</sup> The violation bureau may dispose of all traffic violations except certain serious offenses.<sup>108</sup> The

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<sup>101</sup> 35 Ohio St. 2d at 86, 298 N.E.2d at 537.

<sup>102</sup> 46 AM. JUR. 2d Judges § 83 (1969).

<sup>103</sup> *Id.*

<sup>104</sup> 407 U.S. 345 (1972). See Comments, *The Supreme Court and the Limited Jurisdiction Courts-Ward and Shadwick*, 1 J. SYSTEM J. 56 (1974).

<sup>105</sup> 407 U.S. at 350.

<sup>106</sup> OHIO TRAF. R. 13(A), provides that in the absence of a clerk, "the court shall appoint any appropriate person of the municipality or county in which the court sits" to perform the duties of the clerk with regard to the Violations Bureau. The duties of the clerk of courts are ministerial in nature, see *Warwick v. State*, 25 Ohio St. 21 (1874); *State ex rel. Glass v. Chapman*, 67 Ohio St. 1, 65 N.E. 154 (1902).

<sup>107</sup> OHIO TRAF. R. 13(A), provides that the "violations bureau shall accept appearance, waiver of trial, plea of guilty and payment of fine and costs for offenses within its authority."

<sup>108</sup> OHIO TRAF. R. 13(B) allows the violation bureau to dispose of any traffic violation except:

(1) Indictable offenses; (2) Offenses resulting in serious accident; (3) Operating a motor vehicle while under the influence of alcohol or any drug of abuse, or permitting another person, who is under the influence of alcohol or any drug of abuse, to operate a motor vehicle owned by the defendant or in his custody or control; (4) Reckless driving; (5) Leaving the scene of an accident; (6) Driving while under suspension or revocation of driver's license; (7) Driving without being licensed to drive; (8) Exceeding the speed limit by more than twenty miles per hour; (9) A second moving traffic offense within a twelve-month period; and (10) Failure to stop and remain standing upon meeting or overtaking a school bus stopped on the highway for the purpose of receiving or discharging a school child; (11) Willfully eluding or fleeing a police officer; (12) Drag racing; (13) Any offense otherwise eligible for processing by a traffic violations bureau where the officer, by reason of unusual circumstances, marks the ticket as "personal appearance required."

Rules of Criminal Procedure also provide for a similar procedure in minor misdemeanor cases in which the penalty does not exceed one hundred dollars.<sup>109</sup>

An expansion of Traffic Rule 13 and Criminal Rule 4.1 that would allow the mayor to perform the ministerial duties of the clerk of courts of accepting pleas of guilty and fines would be a reasonable alternative to the present mayor's court system. An individual who opted to plead guilty and pay a fine would not have to make a court appearance. If an individual decided to or was required to proceed to court on the charge, he would proceed to the appropriate county or municipal court. The defendant, if he proceeded to trial, would be guaranteed a neutral and legally competent judge to decide his case in a convenient forum. If the defendant did not proceed to trial, he could pay his fine to the local violations bureau in which the mayor (or other appropriate individual such as the village clerk) would perform a ministerial function as delegated by the Traffic Rules and the Rules of Criminal Procedure. The coupling of judicial "circuit riding" and a violations bureau in communities that are now served by mayor's courts would eliminate many of the present defects involved in a trial in mayor's court.

### VIII. CONCLUSION

The mayor's courts should be abolished, since their existence is detrimental to the modern American legal system. First, the mayor, whether an executive or legislative official, has an inherent pecuniary interest in obtaining fines derived from convictions in his court. The mayor has a duty to the community to maintain fiscal soundness; a part of fiscal stability may be attributable to the fines imposed by the mayor. A mayor could reasonably be expected to lean toward conviction in order to preserve his political office and maintain a strong fiscal position for the community.

Second, a criminal defendant, whether charged with a misdemeanor or a felony, is entitled to a minimum level of due process and equal protection. A situation in which a defendant may forfeit his liberty or property entitles him to a judge who is aware of the complex elements of due process and equal protection. A lay mayor cannot be expected to be aware of the legal complexities involved. When tried before a mayor uneducated in law, the accused is more likely to have an unfair trial than if his case were determined by a

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<sup>109</sup> OHIO R. CRIM. P. 4.1.

judge educated in law. Such an unfair situation should not be tolerated.

The mayor's courts should be totally abolished.<sup>110</sup> The void created by the abolition of the mayor's courts could be filled by some form of judicial "circuit riding" and the establishment of violation bureaus in the affected communities. This would allow the people of Ohio a convenient form of justice, and at the same time they would be guaranteed a "neutral and detached" judge who by his legal education would be able to afford a defendant a fair trial.

*John J. Chernoski*

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<sup>110</sup> A bill has been recently introduced in the Ohio House of Representatives to abolish mayor's courts, H.B. 786, 111th General Assembly, (1975).